

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY GUSLER,

Plaintiff,

v.

MATTHEW FISCHER, SALVATORE
GUERRERI, PETER J. LISTRO ASSOCIATES,
LTD., UNISAR, INC., AVITA CORPORATION,
TARGET CORPORATION, TOYS “R” US,
INC., AMAZON.COM, INC. and CHELSEA &
SCOTT, LTD. d/b/a ONESTEP AHEAD,

Defendants.

Case No. 07 CV 9535 (RWS)

PLAINTIFF’S RULE 26(f) REPORT

Pursuant to Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure, plaintiff Timothy Gusler, by his undersigned counsel, respectfully submits this Rule 26(f) Report. Counsel for defendants refused to participate in a Rule 26(f) conference and have not participated in the drafting or filing of this report.¹

Pursuant to Rule 26(f)(3), counsel for plaintiff proposes the following discovery plan:

¹ On February 28, 2008, undersigned counsel for plaintiff wrote to counsel for defendants to schedule a Rule 26(f) conference based on the timing prescribed by Rules 16(b)(2) and 26(f)(1). (A copy of the February 28, 2008 letter is attached hereto as Exhibit A). On March 3, 2008, counsel for defendants responded that they would not participate in a Rule 26(f) conference because undersigned counsel was reading the rules incorrectly. (A copy of the March 3, 2008 letter is attached hereto as Exhibit B). Upon request for further clarification, counsel for defendants wrote an email explaining their reasoning. (A copy of the March 3, 2008 email is attached hereto as Exhibit C). A draft of this Rule 26(f) Report was sent to counsel for defendants on March 7, 2008. On March 8, 2008, counsel for defendants informed undersigned counsel that they objected to the filing of this report.

(A) *Automatic Disclosures:* No changes are necessary to the timing, form or requirement of disclosure set forth in Rule 26(a). Plaintiff is prepared to exchange initial disclosures immediately.

(B) *Discovery Scope and Schedule:*

1. Plaintiff presently anticipates that he will seek discovery on the following issues:

a. Party Discovery

i. Plaintiff will seek documents and testimony regarding defendants' efforts to commercially exploit plaintiff's design drawings.

ii. Plaintiff will seek documents and testimony regarding the defendants' efforts to design, market, manufacture and sell the infringing nasal aspirator product.

iii. Plaintiff will seek documents and testimony regarding the sale, revenue and profit from the infringing nasal aspirator product.

b. Non-Party Discovery

i. Plaintiff will seek documents and testimony from J. Marvin Feigenbaum regarding Mr. Feigenbaum's experience in the medical device industry, his meetings with plaintiff, his meetings and relationships with defendants regarding plaintiff's invention and his efforts to exploit plaintiff's drawings and invention.

ii. Plaintiff will seek documents and testimony from SPO Medical, Inc. on the limited issue of the company's business dealings, if any, with defendant Avita Corporation.

2. Fact discovery should be completed within four months of the service of initial disclosures.

3. Plaintiff proposes that experts be identified thirty days prior to the close of fact discovery, along with a description of the issues on which each expert will offer testimony. Expert reports will be served on the final day of fact discovery. Contradictory or rebuttal expert designations and reports will be made according to the provisions of Rule 26(a)(2)(C)(ii).

(C) *Electronic Information:*

1. Plaintiff will seek several categories of email correspondence from each defendant. Plaintiff anticipates that the emails will be stored on individual computers and network servers that can be searched with conventional search tools. Consequently, it will not be expensive or burdensome for defendants to find and retrieve responsive documents. Plaintiff will request that all emails be produced electronically in native file format, with all attachments.

2. Plaintiff will seek books and records regarding sales of the infringing nasal aspirator and documents regarding purchase orders, invoices, warehouse inventories and related records. Those documents are likely to be available in electronic format stored in spreadsheets, as electronic documents or as images of paper documents stored electronically. The documents can be identified with conventional search tools and will not be burdensome or expensive to produce.

(D) *Privilege Issues:* Plaintiff does not anticipate the need for any procedures that differ from the procedures in Rule 26(b)(2)(B).

(E) *Discovery Limits*: Plaintiff does not anticipate a need to change the limits imposed by the Federal Rules of Civil Procedure or the Local Rules of this Court.

(F) *Other Orders*: Plaintiff does not anticipate the need for any additional orders.

Dated: New York, New York
March 10, 2008

A handwritten signature in blue ink, appearing to read "Charles von Simson".

Stephen M. Chin (SC 8094)
Charles von Simson (CV 1038)
von Simson & Chin LLP
62 William Street, Sixth Floor
New York, New York 10005
Telephone: (212) 514-8645
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Attorneys for Plaintiff Timothy Gusler

EXHIBIT A



VON SIMSON & CHIN LLP

CHARLES VON SIMSON
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February 28, 2008

BY EMAIL AND MAIL

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Jeffrey M. Kaden, Esq.
Michael I. Rackman, Esq.
Yuval H. Marcus, Esq.
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270 Madison Avenue
New York, New York 10016

Phillip Furgang, Esq.
Furgang & Adwar L.L.P.
1325 Avenue of the Americas, 28th Floor
New York, New York 10019

David Jaroslawicz, Esq.
Jaroslawicz & Jaros
225 Broadway, 24 th Floor
New York, New York 10007

Re: Timothy Gusler v. Matthew Fischer, Salvatore Guerreri, Peter J. Listro
Associates, Inc., Unisar, Inc., Avita Corporation, Target Corporation, Toys "R"
Us, Inc., Amazon.com, Inc., Chelsea & Scott, Ltd. and Wal-Mart Stores, Inc.,
Case No. 07 CV 9535 (RWS)

Dear Counsel:

Rule 26(f) of the Federal Rules of Civil Procedure requires the parties to confer regarding discovery at least 21 days before a scheduling order is due pursuant to Rule 16(b). A scheduling order is due in this case not later than April 2, 2008, 90 days following the January 3, 2008 Notices of Appearance by counsel for Corporate Defendants.

Accordingly, please advise me as to your availability for a Rule 26(f) conference on or before March 12, 2008.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Charles von Simson', written over a printed name.

Charles von Simson

EXHIBIT B

Furgang & Adwar, L.L.P.
COUNSELORS IN INTELLECTUAL PROPERTY AND ENTERTAINMENT LAW

Philip Furgang
Stephanie Furgang Adwar

Of Counsel:
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28th Floor
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March 3, 2008

VIA E-MAIL ONLY

Charles von Simson, Esq.
von Simson & Chin LLP
62 William Street - Sixth Floor
New York, New York 10005

RE: Gusler v. Fischer
Case No. : 07 CV 9535 (RWS)
Our File No. : 9868

Dear Charlie:

Thank you for your letter of February 28, 2008.

We respectfully note that your interpretation of the Rules is in error and we will not proceed as you request.

Cordially,
FURGANG & ADWAR, L.L.P.


PHILIP FURGANG for the Firm
philip@furgang.com

PF:cr

cc: Sheldon Palmer, Esq. (via e-mail only)
Jeffery M. Kaden, Esq. (via e-mail only)
Michael I. Rackman, Esq. (via e-mail only)
Yuval H. Marcus, Esq. (via e-mail only)
David Jaroslawicz, Esq. (via e-mail only)

EXHIBIT C

Subject: RE: Gusler v. Fischer

Date: Monday, March 3, 2008 4:03 PM

From: Philip Furgang <philip@furgang.com>

Reply-To: philip@furgang.com

To: 'Charles von Simson' <cvs@vsandc.com>, <sheryl@furgang.com>, "'Sheldon Palmer Esq. Esq.'" <palmersp@aol.com>, <jkaden@grr.com>, <mrackman@grr.com>, <ymarcus@grr.com>, <davidjaroslawicz@yahoo.com>

Priority: Highest

Charlie:

Thank you for your e-mail. In response:

First, no answers have been served in this matter. As a practical matter there is nothing to exchange at this point.

Second, Rule 26(f)(1) directs that the parties "must confer ... at least 21 days before a scheduling conference is to be held... ." A scheduling conference was ordered by and then adjourned by the court.

The alternative, under Rule 26(f)(1) is "a scheduling order is due under Rule 16(b)" does not apply here. The plain reading of Rule 16 makes that very clear: A judge must issue a scheduling order (A) after receiving the parties' report under 26(f) or (B) at a scheduling conference (which, as noted, has been adjourned).

Rule 16 is not self-executing. It requires the judge's order and none has been issued.

Therefore, we conclude that your interpretation of the Rules is in error.

If we may be of further assistance, please do not hesitate to contact us.

Best personal regards,

Phil

Philip Furgang

FURGANG & ADWAR, L.L.P.

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From: Charles von Simson [mailto:cvvs@vsandc.com]
Sent: Monday, March 03, 2008 2:20 PM
To: sheryl@furgang.com; Sheldon Palmer Esq. Esq.; jkaden@grr.com; mrackman@grr.com; ymarcus@grr.com; davidjaroslawicz@yahoo.com
Cc: philip@furgang.com
Subject: Re: Gusler v. Fischer

Phil:

So we can dispense with the pre-motion “meet and confer,” can you give me some idea of why you think I’m wrong?

Charlie

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From: Sheryl Britney <Sheryl@furgang.com>

Organization: Furgang & Adwar, L.L.P.

Reply-To: <sheryl@furgang.com>

Date: Mon, 03 Mar 2008 12:56:59 -0500

To: <cvs@vsandc.com>, "Sheldon Palmer Esq. Esq." <palmersp@aol.com>, <jkaden@grr.com>, <mrackman@grr.com>, <ymarcus@grr.com>, <davidjaroslawicz@yahoo.com>

Cc: <philip@furgang.com>

Subject: Gusler v. Fischer

RE: Gusler v. Fischer
Case No. 07CV9535 (RWS)
Our File No. 9868

Attached is sent on behalf of Philip Furgang, Esq.

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